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No. 82-1871

In The

Supreme Court of the United States

October Term 1982

THE STATE OF TEXAS,

Petitioner,

vs.

PLATORO LIMITED, INC.,

Respondent.

IN RE THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This case arises from the salvage activities conducted by Platoro, Ltd., Inc., in 1967, on the *Espiritu Santo,* a Spanish ship which sank approximately one-half mile off Padre Island, Texas, in 1554. From 1554 until 1967, when the shipwreck and its artifacts were salvaged by Platoro, Ltd., Inc., the shipwreck and artifacts were absolutely lost to mankind and were in constant danger of being destroyed by the activities of man, the ravages of nature, or both.

The issues presented for review by this court are:

1. Whether the salvage of the *Espiritu Santo* is a "traditional maritime activity," making such salvage activities subject to the admiralty jurisdiction of the federal court.

2. Whether the shipwreck and artifacts salvaged were in a "marine peril," both as a matter of fact and as a matter of law, as a result of having been lost to mankind for over four hundred years and being continuously subjected to the ravages of nature and the actions of mankind engaged in commercial maritime and oil exploration activities.

3. Whether the State of Texas had any legislative or judicial mandate which would have constituted "constructive rejection" of Platoro's salvage services and whether such "constructive rejection" must have been reasonably understood by the salvor.

4. Whether the legislative consent to sue resolution secured by Platoro, Ltd., Inc., constituted a waiver of the State's Eleventh Amendment immunity.

TABLE OF CONTENTS

Pages

Reasons for Denying the Petition 2

A. The Law of Salvage Has Already Been Judicially Modified to Account for Ancient Shipwrecks. 2

B. Marine Peril Existed Both as a Matter of Fact and as a Matter of Law. 5

C. Platoro's Salvage Services Were Not Constructively Rejected by the State. 8

D. The Legislative Consent to Suit Resolution was an Effective Waiver of the State's Eleventh Amendment Immunity. 12

Conclusion 13

INDEX OF AUTHORITIES

CASES

Butler v. Boston S. S. Co., 130 U.S. 527 (1889) 12

Cobb Coin Co. v. Unidentified Wreck & Abandoned Sailing Vessel, 525 F.Supp. 186 (S.D.Fla. 1981), 549 F.Supp. 540 (S.D.Fla. 1982) 4

Detroit Trust Co. v. Barlum S. S. Co., 293 U.S. 21 (1934) 12

Fort Myers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137 (5th Cir. 1968) 7

Fisher v. The Sybil, F.Cas. 4824 (1816) aff'd., 4 Wheat (17 U.S. 98) 6

TABLE OF AUTHORITIES—Continued

Pages

Georgiana, F.Cas. 5355 (D.Mass. 1866) 6

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc., 518 F.Supp. 816 (W.D.Tex. 1981) 5, 11

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc., 695 F.2d 893 (5th Cir. 1983) 9, 10

Schley v. Couch, 284 S.W.2d 333 (Tex. 1955) 11

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 12

Thompson v. One Anchor and Two Chains, 221 F. 770 (W.D.Wis. 1915) 6

Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (Treasure Salvors I) 3

Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (Treasure Salvors III) 6

United States v. Diaz, 490 F.2d 113 (9th Cir. 1974) 10

Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor and Four Shots of Anchor Chain, 478 F.Supp. 973 (E.D.La. 1979) 6

CONSTITUTION, STATUTES AND RULES

Federal

Federal Antiquities Act, 16 U.S.C.A. § 433 10

AUTHORITIES CITED—Continued

Pages

Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 11

U.S. Constitution Amend. XI 12

State

Texas Antiquities Code, Tex.Nat.Res.Code ch. 191 9

Tex.Rev.Civ.Stat.Am., art. 5421 (repealed 1977) 1905 Tax Laws 38 10

Tex. Penal Code, art. 147b (repealed 1969), 1939 Tex. Laws 60 10

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Platoro, Ltd., Inc., Respondent herein, prays this Honorable Court to deny the petition for writ of certiorari heretofore filed by the State of Texas for several reasons. First, the State of Texas, dissatisfied with an adverse ruling of the courts below, is seeking to have this court upset the well-settled federal maritime law governing salvage activities when the state of salvage law has already been modified to adapt to salvage cases dealing with ancient shipwrecks. Second, the Fifth Circuit has not rendered any decision which is in conflict with the decision of any other federal court of appeals on the same matters pre-

sented in this petition. Third, the issues raised by the State of Texas are concerned with adverse factual findings by the district court and appellate court, rather than legal issues.

REASONS FOR DENYING THE PETITION

A. The Law of Salvage Has Already Been Judicially Modified to Account for Ancient Shipwrecks.

The federal courts have already judicially enacted a doctrine for the protection of archaeologically important wrecks, when said wrecks are being salvaged. The State of Texas has asserted that the state of salvage law as it concerns archaeologically important sites is such that irreparable and immediate damage would occur to such sites unless this court were to adopt the law of sea mining. The State of Texas would further have this court preempt federal salvage law and grant to the State the right to control the salvage of pre-twentieth-century shipwrecks lying within a state's territorial waters.

Platoro would suggest that a grant to the various coastal states of their right to control salvage activities occurring within state territorial waters would prompt greater confusion in what is essentially a harmonious body of salvage law. The State of Texas would have this court believe that the state of salvage law is such that archaeologically important underwater sites are open to unbridled exploration activities conducted by salvors. The State of Texas has failed to realize and appreciate that federal maritime salvage law has, like any other body

of law, changed to keep up with the times and events as they pertain to ancient shipwrecks.

In 1967, the find of the *Espiritu Santo* by Platoro, Ltd., Inc., was the first successful salvage exploration ever conducted along the Texas coast. Subsequent to that date, many numerous other finds and salvage activities were conducted off the coast of Florida, and as a result of the conflicts which arose between the various states and the various salvage parties, the body of salvage law concerning archaeological sites began to take shape. At the outset, the Fifth Circuit, in *Treasure Salvors, Inc. v. Unidentified Wreck & Abandoned Sailing Vessel,* 569 F. 2d 330 (5th Cir. 1978) (*Treasure Salvors I*), adopted the law of finds as one of the primary bases regarding lost ancient ships and artifacts. Actually, the law of finds granted to the finder the title to the artifacts recovered. Such a law implicitly recognized and awarded to the salvors title to the artifacts recovered because the artifacts and shipwrecks had been "lost" to all of mankind. By risking their time, money, and often their lives, the salvors were rewarded with title to the artifacts recovered.

In much of the litigation conducted in the *Platoro* cases, as well as in the *Treasure Salvors* cases, the issue was often raised by the states that the salvors, when salvaging the artifacts, often destroyed historical and archaeological information which was just as important as the artifacts themselves. In essence, this is and was a valid concern on behalf of the states as well as the salvors. However, the federal courts have recently adopted a provision that would require all salvors to conduct salvage activities in such a manner so that the historical and archaeological information, as well as the artifacts them-

selves, can be preserved for the use of mankind. This requirement has been voiced in the various opinions arising from the case of *Cobb Coin Co. v. Unidentified Wreck & Abandoned Sailing Vessel,* 525 F.Supp 186 (S.D.Fla. 1981) and 549 F.Supp. 540 (S.D.Fla. 1982). Therefore, the fears of the State of Texas would be alleviated because henceforth all salvage activities would be conducted under the guidance of and with the cooperation of licensed underwater archaeologists who would ensure that the salvage activities were properly conducted.

> Thus, there can be no suggestion that federal admiralty procedures sanction salvaging methods which fail to safeguard items and the invaluable archaeological information associated with the artifacts salved. Admiralty's policy of weighing the merit of the salvors' service in determining an appropriate award has, since the establishment of the federal court, been "a wholesome doctrine, and it makes it the interest, as well as the duty, of salvors to act with good faith, and never to sleep on their post, or to make a merit of their frauds." *Cobb Coin Co. v. Unidentified Wreck & Abandoned Sailing Vessel,* 525 F.Supp. 186, 208 (S.D.Fla. 1981), 549 F.Supp. 540 (S.D.Fla. 1982).

In the instant case involving Platoro, this Court should not adopt the law of sea mining, but should approve of the holdings in the *Cobb Coin* cases, *supra,* as they would apply prospectively. At the time it conducted its salvage activities, Platoro, Ltd., Inc., endeavored to and did record the provenance data and, in fact, utilized the "state of the art" techniques in restoring the artifacts recovered. The State of Texas, at the time of trial, repeatedly attempted to show that the restoration techniques utilized by Platoro were scientifically unsound. However, the State's own witnesses admitted that but for the Platoro find, the science

and art of restoring underwater artifacts would never have developed. Platoro did use its best efforts in restoring the artifacts based upon the knowledge and the state of the art existent in 1967. At this time, it is unnecessary for this Court to fashion a new body of law. The federal district courts have already begun to fashion and adapt salvage law to deal with the issue of historically and archaeologically important underwater sites. As they presently exist, the new requirements are sound and productive. Obviously, the appellate courts will also impress any further requirements onto this body of salvage law if they deem it necessary. For this Court to deprive the federal courts of their exclusive admiralty jurisdiction and to throw open to the various states and their political legislative bodies the control of maritime and underwater activities conducted within state territorial waters would dismantle the body of uniform federal maritime law that this Court has so often sought to protect.

B. Marine Peril Existed Both as a Matter of Fact and as a Matter of Law.

At the district court level, the judge held that the *Espiritu Santo* "was lost and had been lost for four centuries when it was discovered by Platoro" *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.*, 518 F.Supp. 816 (W.D.Tex. 1981) (Appendix B-7).[1] The recovery of abandoned and derelict property in navigable waters has always been highly favored in maritime law. The subject of salvage received much greater attention in the eighteenth and early nineteenth centuries,

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[1]For purposes of simplification, Platoro Limited, Inc., will refer to the Appendix filed and utilized by the State of Texas in its Petition for a Writ of Certiorari.

and a firm judicial base was established wherein it was held that the recovery of derelict property constituted a meritorious act of salvage. *Fisher v. The Sybil,* F.Cas. 4824 (1816) aff'd., 4 Wheat (17 U.S. 98).

The earlier cases had reasoned that where a salvor had returned lost, abandoned, or derelict property to the rightful owner, if one existed, then such salvor was entitled to a higher award than ordinary salvage cases. *Georgiana,* F.Cas. 5355 (D.Mass. 1866). In more recent cases, the courts have held that persons were entitled to a salvage award for the recovery of "lost" artifacts. *Thompson v. One Anchor and Two Chains,* 221 F. 770 (W.D. Wis. 1915); *Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor and Four Shots of Anchor Chain,* 478 F.Supp. 973 (E.D.La. 1979). The Fifth Circuit, in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel,* 640 F.2d 560 (5th Cir. 1981) (*Treasure Salvors III*), described the rights of the salvor of lost or abandoned property:

> Although cases involving the principles of the law of finds are few and far between, we think that a basic principle emerges with some clarity from the cases which have considered problems similar to the one presented here. Persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so are legally protected against interference from others, whereas persons who simply discover or locate such property, but do not undertake to reduce it to possession, are not. This principle reflects a very simple policy—the law acts to afford protection to persons who actually endeavor to return lost or abandoned goods to society as an incentive to undertake such expensive and risky ventures. *Treasure Salvors III, supra,* 572-573.

The Fifth Circuit has held that a "marine peril" is one which need not necessarily be one of imminent and absolute danger. "The property must be in danger, either presently or reasonably to be apprehended." *Fort Myers Shell & Dredging Co. v. Barge NBC 512*, 404 F.2d 137, 139 (5th Cir. 1968). In the instant case, the district court noted that the drilling operations for oil and gas activities were ongoing in the area near the wrecksite, and that the extensive seismic operations being conducted in the activity could easily have disrupted the wrecksite and destroyed or scattered the artifacts even further (Appendix B-9, B-10).

No single event underscores the reality of "marine peril" more than the instance in which the Army Corps of Engineers in constructing the channel for Port Mansfield, Texas, dug right through the remains of the *Santa Maria*, the sister ship of the *Espiritu Santo*, and destroyed many artifacts and ruined many others. Even Curtis Tunnell, the state archaeologist, stated that, "I think that there are, in the past have been, a variety of manmade perils that could threaten those wrecks" (Tr. 717).

The State's argument that Platoro should have made "reasonable inquiry of academically-trained experts" implies that Platoro did not consult experts regarding the salvage and preservation of artifacts. Surely, a former curator and director of underwater exploration for the Smithsonian Institution in Washington, D.C. (Tr. 316) was qualified to give valuable advice and assistance to Platoro, and in fact did. The advice sought from and given by Mendel Peterson to the Platoro group was very helpful in enabling them to preserve the artifacts once they were recovered (Tr. 317-321).

The State of Texas ignores the fact that prior to the Platoro find, no extensive data or process had been developed for the preservation of artifacts (Tr. 245-246). The field of underwater archaeology was in its infancy at the time of the Platoro find, and the "state of the art" as to the preservation techniques was almost nonexistent. With the Platoro find acting as a stimulus, a whole new field of academic and scientific endeavor and study has been created (Tr. 245, 251, 714).

The district court held as a matter of fact that the artifacts were in a marine peril. The Fifth Circuit reaffirmed the factual finding that a marine peril existed (Appendix A-11, n. 9). The Fifth Circuit also held that as a matter of law a marine peril existed, and sub silentio reaffirmed the factual finding of the district court that the artifacts had been "lost" and subject to manmade and natural perils.

C. Platoro's Salvage Services Were Not Constructively Rejected by the State.

The Fifth Circuit, in rendering its opinion, held that they could "find no case where a salvage award was denied because of a constructive rejection of salvage services." 695 F.2d at 902. The court further noted the following:

> Platoro had no reason to understand that its services had been rejected. In the first place, it was far from clear in 1967 that Texas owned the vessel; that was not established until Platoro failed to appeal the 1976 district court decision awarding the *res* to Texas. Further, even if Platoro should have known that Texas was the owner, which we do not believe it should have, the statutes were not calculated to put Platoro on notice that its services had been rejected. There was nothing in the penal statute to indicate to Platoro that a sunken Spanish galleon was an "archaeological site"

within the meaning of the statute. Texas had apparently made no attempt to designate such sites, or indeed even to define them. *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.,* 695 F.2d 893, 902 (5th Cir. 1983) (Appendix A-13).

In spite of the foregoing, the State of Texas argues that its legitimate interest in protecting its heritage from unauthorized looting should be protected with "maximum sensitivity." However, the State of Texas in this case is once again attempting to apply its 20/20 hindsight to situations which clearly were not contemplated at the time the salvage services were rendered, either by the State itself or by Platoro.

Prior to the Platoro find, the State of Texas had no specific knowledge of the location of the three Spanish galleons (Tr. 706-709), had never designated any historical underwater sites or archaeological sites (Tr. 701), and had not undertaken any procedures or precautions to exercise control over "underwater archaeological sites" (Tr. 705). Furthermore, in 1967, the General Land Office maintained no list of archaeological sites and had instituted no procedure for identifying, marking or permitting exploration on archaeological sites (Tr. 513). As was noted by the appellate court, the Texas Antiquities Code, Tex.Nat. Res.Code Ann. §§ 191.001-.174 (Vernon 1978 & Supp. 1982) was enacted in 1969 as a direct result of the Platoro find, and it makes extensive and pointed reference to sunken ships. There was no statute enacted in the State of Texas at the time prior to or during the Platoro salvage activities that would have put any reasonable person on notice that the salvage activities were being "rejected" by the State of Texas. Platoro conducted the first successful salvage of a Spanish ship ever conducted in the State of

Texas, and it clearly could never have been intended that such salvage activities were rejected.

The State has suggested that art. 147b of the Texas Penal Code was an effective rejection of Platoro's salvage activities. A reading of art. 147b would lead one to conclude that the statute, in any event, was vague, overbroad, and unconstitutional—therefore, unenforceable. The statute applies only to nonresidents of Texas, and does not apply to Texas residents, and is therefore discriminatory. Surely, if the State were so concerned with protecting "archaeological sites" in 1967, it would have extended the prohibitions of that statute to *all* persons, not simply persons from outside the state. The statute itself does not define "archaeological sites," and certainly does not refer to any underwater sites in its text. The Federal Antiquities Act, 16 U. S. C. A. § 433, was very similar in context and wording to art. 147b. The Federal Antiquities Act likewise was similarly vague and unclear, and for that reason was held unconstitutional in *United States v. Diaz,* 490 F.2d 113 (9th Cir. 1974).

The State has also proffered art. 5421 Tex.Rev.Civ. Stat. as its evidence that the services of Platoro were statutorily rejected. As the Fifth Circuit noted at footnote 10 of its opinion, *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc., supra* (Appendix A-12):

> 10. Texas does not argue that its state court suit under article 5421 to enjoin Platoro's excavation constituted a rejection. Indeed, it could not, since the

> services at issue were rendered before the injunction was issued.

Furthermore, the article in question is contained under the statutory heading "Suits for Minerals and Timber."

One of the points not addressed by the State in considering the "constructive rejection" of Platoro's activities is the fact that even under Texas law, Platoro would be entitled to keep the artifacts which it recovered. Essentially, the Texas Supreme Court has adopted the "finder's-keepers" theory in awarding lost property to the finder. *Schley v. Couch,* 284 S.W.2d 333 (Tex. 1955). The State may seek to distinguish the holding in *Schley* on the basis that it does not deal with either public lands or archaeological relics. Platoro's counsel has been unable to find any Texas cases which would support such a position being adopted by the State. In its opinion, the district court held that the Submerged Lands Act of 1953, 43 U.S.C.A. §§ 1301-1315, did not "purport to erode maritime law which governs any activity relating to navigation or commerce on navigable waters" *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel,* 518 F.Supp. 816 (W.D.Tex. 1981) (Appendix B-4, n. 1). Therefore, the State has no reasonable basis on which to statutorily interfere with the salvage activities which were conducted by Platoro. Only Congress has the power to enact statutes which would perfect, modify, or otherwise affect the maritime substantive law of this country. Even then, Congress can only make such modifications in the

main body of maritime law when such changes are enacted only in furtherance of supplementation of a uniform body of federal maritime law. The constitutional power of Congress to enact such legislation is made possible by the necessary and proper clause. *Butler v. Boston S.S. Co.*, 130 U.S. 527 (1889). Therefore, no state legislation is valid if it contravenes acts of Congress or materially alters judicial or legislative expressions of general maritime law (*Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)), and only Congress has the power to determine the maritime law that shall prevail throughout this country. *Detroit Trust Co. v. Barlum S.S. Co.*, 293 U.S. 21-42 (1934).

D. The Legislative Consent to Suit Resolution was an Effective Waiver of the State's Eleventh Amendment Immunity.

In holding that the legislative waiver was an effective waiver of the State's eleventh amendment immunity, the Fifth Circuit noted that no Supreme Court case had ever considered a situation which involved an express legislative waiver to bring a particular lawsuit. The cases which have been considered by the Supreme Court were usually waivers contained in statutes of general application which contemplated large numbers of suits being brought pursuant to statutory enactment. The legislative waiver secured by Platoro was a personal bill which authorized Platoro to seek "whatever relief to which it may be entitled." The consent was unique to this specific case and

circumstances surrounding Platoro's claim. Platoro had previously filed two cases in federal court (*Platoro I* and *Platoro II*) alleging precisely the same facts, and requesting the same remedy. Both suits had been filed ***in rem*** in United States District Courts and it was certainly contemplated that the instant suit would also be filed in the same manner.

The Fifth Circuit was eminently correct in holding that, given the judicial history of the *Platoro* cases and the facts surrounding the legislative waiver of sovereign immunity, Platoro was indeed permitted to file suit in federal court and maintain this present action.

CONCLUSION

For the foregoing reasons, Platoro prays that petitioner, State of Texas, be denied a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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